Batang Kali Estates Sdn Bhd v Romani bte Abdul Aziz & Anor

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO 12–25–92
MOHD HISHAMUDIN JC
15 FEBRUARY 1993

Civil Procedure *— Appeal to High Court — Time for filing memorandum of appeal — When does the 14-day period begin to run — Rules of the High Court 1980 O 55 r 2(1)*

Civil Procedure *— Appeal to High Court — Extension of time for filing notice of appeal — Factors to be taken into consideration for application to be granted*

This was an application by the appellant to file the memorandum of appeal out of time in respect of an appeal from the subordinate court to the High Court. In this case, Form 141 was received by the appellant's solicitor on 30 June 1992 and security for costs was paid on 3 July 1992. The appellant's solicitors received the grounds of judgment and notes of evidence from the subordinate court on 15 July 1992 and thereafter the memorandum of appeal was filed on 20 July 1992.

Held, allowing the application:

(1) For the purpose of filing the memorandum of appeal, the 14-day period begins to run from the date of the service on the appellant of the Form 141 notifying the appellant that the notes of evidence and the grounds of judgment are ready. Since Form 141 was served on the appellant on 30 June 1992, the memorandum of appeal must be filed by 14 July 1992. However the memorandum of appeal was only filed on 20 July 1992. Therefore, the appellant was six days out of time.

(2) The application for extension of time was allowed on the grounds that there was a reasonable explanation for the delay in filing the memorandum of appeal and that the delay was a very short one — by six days and that there was no evidence that the respondent would in any way suffer any substantial prejudice by the granting of an extension.

Per curiam:

The factors to be taken into account in deciding whether to grant an extension of time to file a notice of appeal are: (a) the length of the delay; (b) the reasons for the delay; (c) the chances of the appeal succeeding if time for appealing was extended; and (d) the degree of prejudice to the would be respondent if the application was granted. It is not necessary that all the four factors must be in favour of the applicant in order for the discretion to be exercised in the applicant's favour.

[Bahasa Malaysia summary

Ini merupakan permohonan oleh perayu untuk memfailkan suatu memorandum rayuan luar masa untuk suatu rayuan dari mahkamah rendah ke Mahkamah Tinggi. Di dalam kes ini, Borang 141 telah diterima oleh peguambela perayu pada 30 Jun 1992 dan jaminan untuk kos telah dibayar pada 3 Julai 1992. Peguambela perayu menerima alasan penghakiman dan nota keterangan dari mahkamah rendah pada 15 Julai 1992 dan selepas itu memorandum rayuan telah difailkan pada 20 Julai 1992.

Diputuskan, membenarkan permohonan itu:

(1) Untuk tujuan memfailkan memorandum rayuan, tempoh 14 hari bermula dari tarikh penyampaian Borang 141 kepada perayu memberitahu beliau bahawa nota keterangan dan alasan penghakiman telah siap. Oleh kerana Borang 141 telah disampaikan kepada perayu pada 30 Jun 1992, memorandum rayuan mestilah difailkan pada 14 Julai 1992. Tetapi memorandum rayuan itu hanya difailkan pada 20 Julai 1992. Oleh itu, perayu telah lewat enam hari.

(2) Permohonan untuk perlanjutan masa telah dibenarkan atas alasan bahawa terdapat penjelasan yang munasabah mengenai kelewatan memfailkan memorandum rayuan itu dan kelewatan itu adalah untuk masa yang singkat — enam hari dan tidak terdapat kemudaratan yang substansial jika perlanjutan masa diizinkan.

Per curiam:

Faktor-faktor yang perlu diambil kira apabila memutuskan sama ada untuk mengizinkan perlanjutan masa untuk memfailkan suatu notis rayuan adalah: (a) tempoh kelewatan; (b) sebab-sebab kelewatan; (c) kemungkinan rayuan itu berjaya jika tempoh rayuan dilanjutkan; dan (d) setakat mana penentang akan dimudaratkan jika permohonan itu diizinkan. Keempat-empat faktor itu tidak perlu memihak kepada pemohon untuk penggunaan budi bicara memihak kepada pemohon.]

Cases referred to

1 *Elayachee v Woo Siu Tip* [1991] 3 MLJ 108 (folld)
2 *Parasuraman v Sazali Bin Akhir & Anor and other applications* [1993] 1 MLJ 195 (folld)
3 *Pearson v Chen Chien Wen Edwin* [1991] 3 MLJ 208 (folld)

Legislation referred to

Rules of the High Court 1980 0 55 r 2

Harjeet Singh (*Shearn Delamore & Co*) for the appellant
S Kanagasabapathi (*RK Nathan & Co*) for the respondent

Cur Adv Vult

Mohd Hishamudin JC: This is an application by the appellant to file the memorandum of appeal out of time. Counsel for both parties have requested me to make a ruling on the interpretation of O 55 r 2 of the Rules of the High Court 1980 ('the RHC'), in particular on the question as to when the fourteen-day period begins to run in cases where the appellant is represented by counsel. Does time begins to run from the date of the service of Form 141 on the appellant notifying the appellant that the grounds of judgment and notes of evidence are ready, or from the date when the appellant in fact received the grounds of judgment and notes of evidence from the subordinate court? In the case before me, it is an agreed fact that Form 141 was received by the appellant's solicitor on 30 June 1992, and security for costs was paid on 3 July 1992, but the solicitor received the grounds of judgment and the notes of evidence from the subordinate court only on 15 of July 1992.

Before 1 January 1991, O 55 r 2 states:

> (1) The appellant shall, within fourteen days from the date of service on him of the notice referred to in Order 49, rule 3 subrule (2) of the Subordinate Courts Rules 1980 or within such extended time as the High Court may allow, file in the High Court in duplicate a memorandum of appeal in Form 113A.
> (2) The appellant shall within the like period serve each respondent with a copy of such memorandum and a copy of the appeal record.

However, the Rules of the High Court (Amendment) (No 3) Rules 1990 (PU(A)462/1990) amended sub-r (1) of the above r 2 of O 55; and sub-r (1) as amended reads:

> The appellant shall, within fourteen days from the date of service on him of the notice in Form 141 under Order 49, rule 2 sub-rule (4) or rule 3 sub-rule (2) of the Subordinate Courts Rules 1980 (as the case may be), file in the High Court in duplicate a memorandum of appeal in Form 113A.

Both learned counsel submit that there is an uncertainty as to the law regarding as to when the fourteen-day period begins to run for the purpose of filing the memorandum of appeal. Learned counsel for the appellant submits that it can be argued that the fourteen-day period begins to run from the date of the service on the appellant the grounds of judgment and the notes of evidence. He quotes the following passage from the judgment of Eusoff Chin J (as he then was) in *Elayachee v Woo Siu Tip*[1] at p 110 where his Lordship said:

> I agree with Lamin J in *Abdul Ghani*'s case, that the memorandum of appeal is a necessity and must be filed within 14 days after the service on the appellant's solicitor, of the notes of evidence and the grounds of judgment by the subordinate courts.

With respect, in my view, with the amendment to O 55 r 2(1) of the RHC vide PU(A) 462/90 there is no room any more for anyone to argue that there is still uncertainty in the law. The very purpose of the amendment vide PU(A) 462/90 was to overcome the ambiguity that had existed as regards the interpretation of O 55 r 2 prior to the amendment, and with the amendment I think the position has now been made clear.

I do not propose to indulge in any analysis of the relevant provisions of the RHC and Subordinate Courts Rules 1980 ('the SCR') since I do not think it is necessary for me to do so in the light of recent decided cases which have thrown much light on the subject. I think it would suffice if I only refer to the pertinent part of the judgment of Eusoff Chin J (as he then was) in *Elayachee*[1] and also to the judgment of KC Vohrah J in *Parasuraman a/l Kuppan v Sazali bin Akhir & Anor.*[2] In *Elayachee,*[1] the learned judge (at p 110) explained:

> Order 49 r 3(1) of the SCR was then amended by PU(A) 67/88. This amendment required that the preparation of the record of appeal must be done by the subordinate courts only in an appeal where the appellant was unrepresented by counsel. PU(A) 67/88 also introduced a new rule which is O 49 r 3A which requires the appeal record to be prepared by the appellant if he is represented by counsel. When these amendments were introduced, the Rules Committee apparently overlooked to amend the provision of O 55 r 2 of the RHC so that in respect of an appeal where the appellant was represented by a counsel, the period of filing a memorandum of appeal was not fixed by the rules. This situation however, had been rectified by the Rules Committee by amending O 55 r 2(1) of the RHC vide PU(A) 462/90 so as to put the position back to normal, ie the memorandum of appeal whether or not an appellant is represented by counsel, must be filed within two weeks:
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> (i) where the appellant is represented by counsel, from the date of service on him of Form 141 notifying the appellant that the notes of evidence and grounds of judgment are ready; and
> (ii) where the appellant is not represented by counsel, from the date of the service on him of Form 141 notifying the appellant that the appeal record is ready.
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> An appeal record whether prepared by the subordinate courts under O 49 r 3 of the SCR or prepared by the appellant's counsel under O 49 r 3A of the SCR must contain those documents specified in the respective rules. In either case it excludes the memorandum of appeal from forming part of the appeal record. The memorandum of appeal is to be filed separately under O 55 r 2 of the RHC.

In *Parasuraman*[2] the learned judge (at p 3) had this to say:

> Memorandum of appeal after 1 January 1991
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> With the intervention of legislation the conflict in the judicial views has been resolved. The anomaly has been resolved with the amendment of 0 55 r 2 of the Rules of the High Court 1980 by PU(A) 462/90 as pointed out in *Elayachee.* It came into effect on 1 January 1991 and reads:
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> '(1) The appellant shall, within fourteen days from the date of service on him of the notice in Form 141 under Order 49, rule 2 sub-rule (4) or rule 3 sub-rule (2) of the Subordinate Courts Rules 1980 (as the case may be), file in the High Court in duplicate a memorandum of appeal in Form 113A.'
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> Notification that certified copy of evidence and grounds of decision (O 49 r 2(4) or Record of Appeal (O 49 r 3(2) are ready - Form 141.
>
> It will be noticed that Form 141 in the First Schedule to the SCR and specified in O 49 assumes a role of very great importance for two reasons. For the purpose of calculating the time within which to file the memorandum of appeal,

in view of O 55 r 2 of the Rules of the High Court 1980 time runs for 14 days from the date of receipt by the appellant of Form 141, not from the date of receipt of the notes of evidence or grounds of decision.

Accordingly, in this case, relying on the above cases, I would rule that for the purpose of filing the memorandum of appeal, the fourteen-day period begins to run from the date of the service on the appellant of Form 141 notifying the appellant that the notes of evidence and the grounds of judgment are ready. Since Form 141 was served on the appellant on 30 June 1992, therefore the memorandum of appeal must be filed by 14 July 1992. However, since the memorandum of appeal was only filed on 20 July 1992, therefore, the appellant was six days out of time.

Learned counsel for the appellant submits that in the event the court holds that the appellant is out of time, he applies for an extension of time on the grounds that:

(a) there was a delay by the subordinate court in serving on the appellant's solicitor the grounds of judgment and the notes of evidence since he received the grounds of judgment together with the notes of evidence only on 15 July 1992; and
(b) the solicitor had taken prompt action to file the memorandum of appeal by filing it five days after the receipt of Form 141.

Learned counsel for the respondent, while conceding to the facts in (a) and (b), nevertheless opposes the application on the grounds that:

(a) the applicant's supporting affidavit does not state that the applicant has a good chance of succeeding in the appeal; and
(b) the respondent would be prejudiced if an extension is allowed.

Learned counsel referred to *Pearson v Chen Chien Wen Edwin*,[3] where at p 211 Yong Pung How CJ said:

> Counsel for the husband relied on the case of *Hau Khee Wee & Anor v Chua Kian Tong & Anor* [1987] 2 MLJ 146 for the factors to be considered. In that case it was held by Chan Sek Keong J, granting the application, that the factors to be taken into account in deciding whether to grant an extension of time to file a notice of appeal are: (a) the length of the delay; (b) the reasons for the delay; (c) the chances of the appeal succeeding if time for appealing is extended; and (d) the degree of prejudice to the would be respondent if the application is granted ...
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> In our opinion, the extension of time is a question of discretion, and the factors stated by Chan Sek Keong J in *Hau Khee Wee* can be used as a framework in exercising it.

On the question of prejudice, learned counsel for the respondent submitted that the Kuala Kubu sessions court's judgment in favour of the respondent was delivered on 7 August 1991. The respondent is a widow who had lost her husband in the accident and if the application is allowed the respondent would be further delayed from enjoying the fruits of the judgment.

In my view, it is not necessary that all the four factors mentioned must be in favour of the applicant in order for the discretion to be exercised in the

appellant's favour. As has been said in the above judgment, the factors are to be used merely as a framework or guide for the purpose of exercising the discretion. They are not intended to be rigid mandatory requirements. Although the appellant's affidavit does not explicitly say that the appeal has a good chance of succeeding, I am allowing the application for the extension of time on the grounds that there is a reasonable explanation for the delay in filing the memorandum of appeal, that the delay was a very short one — by six days, and that there is no evidence that the respondent would in any way suffer any substantial prejudice by the granting of an extension. Since the foregoing three factors weigh heavily in favour of the appellant, I do not think it is really necessary for me to consider whether there is any merit in the appeal for the purpose of this application.

Application allowed.

Reported by Yap Foo Ken